

STEVEN P. SMITH)
 Claimant)
 VS.)
) Docket No. 259,140
 SUNSHINE METALS)
 Respondent)
 AND)
)
 TRAVELERS INDEMNITY OF ILLINOIS)
 Insurance Carrier)

Respondent appeals from the November 1, 2000, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Respondent contends claimant failed to prove that his alleged February 17, 2000, accidental injury arose out of and in the course his employment with respondent. Additionally, respondent denies claimant provided timely notice of accident pursuant to K.S.A. 44-520. Those are the only issues before the Appeals Board.

After reviewing the evidentiary record filed herein, the Appeals Board finds for preliminary hearing purposes that the Order of the Administrative Law Judge should be affirmed.

Claimant began working in September 1999 at respondent's warehouse as a warehouse worker/saw operator. Claimant contends on February 17, 2000, while working in the "hell hole" stacking remnants, he suffered an injury to his low back while moving a piece of aluminum. Claimant testified he told his immediate supervisor, David Jones, that day, but was denied medical treatment. Claimant contacted his wife by telephone and requested that she schedule an appointment with Dan A. Dopps, D.C. Claimant was examined by Dr. Dopps on February 17, 2000. He advised Dr. Dopps he had suffered a back injury which was related to his employment. Claimant discussed both low back pain

and pain between his shoulder blades. Claimant had been receiving treatment from Maurice L. Duggins, M.D., for upper back and shoulder pain since as early as January 28, 2000. Claimant is not contending the upper back or shoulder complaints are part of this injury. Claimant did go see Dr. Duggins on February 21, 2000, for follow up treatment for the upper back and shoulders. He told Dr. Duggins at that examination that he was also experiencing low back pain from the previous week.

Respondent contends claimant's preexisting problems are not related to his employment at work. They further contend that claimant did not discuss this incident with Mr. Jones. Mr. Jones testified in front of the Administrative Law Judge, stating that he had no recollection of claimant advising him of a low back injury on or around February 17, 2000.

Claimant's wife, Rebecca Smith, testified at preliminary hearing. She discussed a conversation which occurred approximately one week after claimant's alleged date of accident. While she was sitting in a car, claimant and Mr. Jones were standing outside the car talking. Claimant again advised Mr. Jones that his back was still hurting from when he was working in the "hell hole". Claimant was asked by Mr. Jones if he would be returning to work the next day, and claimant said that he would try.

Claimant continued working for respondent, seeking no additional medical care after the February 21, 2000, examination with Dr. Duggins. Claimant testified he was unable to return to the doctor because he did not have sufficient money to afford the co-pay on his health insurance. He was terminated on May 1, 2000, after damaging several thousand dollars worth of material when he cut an order the wrong length.

Respondent contends claimant suffered an injury to his back while attaching a porch to his new mobile home. Claimant denies this, testifying that several of his neighbors did the physical labor on the porch and he simply supervised or did easy work. This testimony by claimant is uncontradicted.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g). In reviewing this record, the Appeals Board finds that claimant has provided the more convincing testimony regarding the injury and how it occurred. In addition, the medical records of Dr. Dopps and Dr. Duggins, created nearly contemporaneous with this injury, support claimant's contentions that he suffered a low back injury on or about February 17, 2000, while at work.

Finally, the Appeals Board finds the testimony of claimant's wife to be credible regarding the conversation claimant had with his supervisor, Mr. Jones, approximately one week after the alleged date of accident. That conversation, by itself, would be sufficient to satisfy the notice requirements of K.S.A. 44-520.

The Appeals Board, therefore, finds that the Order of the Administrative Law Judge, granting claimant benefits in the form of temporary total disability compensation and ongoing medical treatment, should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 1, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 2000.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
William L. Townsley, III, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director